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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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IN THE MATTER OF J AND S
(SUPERVISION ORDER OR A CARE ORDER)

GILLEN J

[1] This case concerns two children whom I shall call J and S in order to protect their anonymity. They are the children of Mrs W and Mr M. J is a boy now aged 13 and S is a boy now aged 10.

[2] This case has a lengthy history extending over several years largely due to an intractable dispute between Mrs W and Mr M concerning contact and residence of the children. The first proceedings occurred as far back April 1997 when Mrs W was granted a residence order in respect of both the children and Mr M was granted contact on Sundays and Mondays. There has been a plethora of hearings before the Family Proceedings Court in Omagh, the Family Care Centre in Londonderry and the High Court in Belfast. A variety of judges and magistrates have grappled with this case.

[3] In many ways this case clearly illustrates the problems depicted by Munby J recently in *Re: D (Intractable Contact Dispute; Publicity)* [2004] 1 FLR 1226 where he said at 1228;

> "Those who are critical of our family justice system may well see this case as exemplify everything that is wrong with the system. I can understand such a view. The melancholy truth is that this case illustrates all too uncomfortably the failings of the system. There is much wrong with our system and the time has come for us to recognise the fact and to face up to it honestly. If we do not we risk forfeiting public confidence."

[4] The length of time that this case has consumed endlessly attempting to resolve the issue of contact between the children and their father in the face of resistance from the mother illustrates too well the frailties in our system.

[5] The key issue that now engages the court is simply whether a care order or a supervision order should be made with regard to these children. A Health and Social Services Trust which I do not propose to identify makes application before this court for a supervision order. The Guardian ad Litem who has been engaged in the case for a lengthy period submits that nothing less than a care order should be made. It is the mother's view that any public law intervention ought to be directed to assisting the mother and each child in dealing with the actions of the father which she alleges have amounted to the infliction of domestic violence on both the mother and the children. The father, who denies, that any such violence has ever occurred, has now reluctantly come to accept the conclusion of the expert opinion in this case, crystallised in the following two extracts from the relevant experts;

(i) Dr Brenda Robson, Chartered Child Psychologist, in a report of 14 June 2004;

> "If Mr M is guilty of violence in relation to Mrs W or the boys, then the termination of contact will have greatly reduced the effects of emotional abuse in relation to this. Likewise, if the abuse was perpetrated by Mrs W in her attempt to end the boys' relationship with their father, then the termination of contact will have greatly reduced this pressure on the boys also. The acrimony and hostility between the parties has been the source of emotional abuse for the boys and termination of contact (with the father) will have removed this pressure, at least for the time being. This does not mean to say that difficulties will not arise in the future, particularly if the boys feel later that they should have been allowed to have a relationship with Mr M and that this was prevented by their mother.
>
> I do not feel that there are sufficient concerns regarding neglect and emotional abuse at the present time to warrant the removal of these children from their mother. I do feel that a form of supervision is required and Mrs W continues to need regular support from the Trust. ….

> Mr M's contact has been suspended for a six month period but I feel it is very unlikely that the contact will resume again this year or in the near future and the Trust might be able to work more positively with this family if the matter of contact is not part of the agenda. The priority for these boys should be a settled and secure home life with their mother who is their main carer. Priority needs to be given to providing the support Mrs W needs to meet the boys' needs. The day to day welfare and emotional well being of the boys in their mother's care is of a greater priority than establishing contact with Mr M. At some time in the future, if the lives of the boys become more settled and if the boys wish it, the matter of their contact with Mr M can be revisited."

(ii) Mr PA Quinn, Consultant Clinical Psychologist, in a report of 14 September came to a similar conclusion namely;

> "..Whilst it is difficult to reach firm conclusions regarding Mrs W and Mr M's relationship and their relative contributions to the dysfunctional nature of their relationship, Mrs W independently exhibits no double personality, difficulty/disorder. Personality disorder in this respect is a term used to describe a pattern of enduring maladaptive ways of perceiving or relating to the world which result in significant impairment of occupational and or social functioning. Such issues are likely to be more manifest and debilitating at times of crises in a person's life. Given this I would expect that Mrs W is likely to experience recurring episodes of psycho-social crises in her life…. One is then left with the question of how to deal with this situation. For example whilst it is inevitable that the children will be damaged by their mother's difficulties, one might have also to question the impact of alternative solutions on their emotional well being, particularly given their ages. I am aware that Dr Robson has addressed this issue and reached similar conclusions. Given this I believe that Mrs W will require long term supports and supervision caring for the children until they reach an age where they are more capable of independently caring for themselves."

[6] In light of this evidence, Mr M withdrew his application for contact and the court therefore is left with the sole issue of determining whether or not a care or supervision order should be made.

[7] I do not feel that any benefit will accrue to the children or the parties if I rehearse at length the sad history in this case or delve into the minutiae of the intractable contact dispute over the years. It is sufficient to indicate that I recognise that before either a care or a supervision order can be made the first stage is for the court to consider whether or not the threshold criteria pursuant to Article 50(2) of the Children (Northern Ireland) Order 1995 have been satisfied. I have read the proposed threshold criteria submitted by the Trust and I have concluded that this represents an accurate and appropriate synthesis of the salient issues in this case. Accordingly I find the threshold criteria to be satisfied by the matters set out in the proposals submitted to me by the Trust in the following terms;

> "(i) The relationship between Mrs W and Mr M has been characterised by disharmony, allegations of domestic violence and acrimony. The ongoing contact dispute between Mrs W and Mr M has had an adverse emotional impact upon the children.
> (ii) There has been a history of poor parenting standards on Mrs W's part, including her physical and emotional care of the children. Mrs W has been noted to demonstrate little warmth and praise to the children and has a tendency to be critical and harsh in her parenting approach. In addition the children' presentation has been extremely poor, wearing ill-fitting clothes with holes.
> (iii) Mrs W has failed to provide a stable and secure home environment for the children who have endured a large number of house moves with the consequent impact upon their security, education and friendships. Mrs W has also lacked basic needs within the home, such as a cooker and a fridge for prolonged periods of time.
> (iv) Mrs W has failed to provide adequate boundaries and routines within the home, manage the children's' behaviour effectively, ensure their attendance at school and completion of homework and manage J's colostomy bag.
> (v) Mrs W has failed to engage on a consistent basis with professionals working with her and to accept and implement advice from professionals attempting to promote her care of the children.

(vi) Mrs W has discussed inappropriate issues in front of the children and has spoken regularly about Mr M in derogatory terms in front of the children."

<u>Care Order or Supervision Order</u>

[8] Before turning to the determination of which is the appropriate order to make in this case, it may be helpful if I outline the essential differences between a care order and a supervision order. These are helpfully set out in *Re: SJ (A Minor) (Care or Supervision Order)* [1993} 2 FLR 919, *Re: O (Supervision Order)* [2001] 1 FLR 923 and *Re: C (Care or Supervision Order)* [2001] 2 FLR 466. In summary they are as follows;

"(i) <u>Care Order</u>

A care order gives to a Trust the power to remove the child without resource even to a Family Proceedings Court for a emergency protection order. The parents' only means of challenging that removal is by an application to discharge the care order, which usually takes some time to be heard, especially if it has to be transferred to a higher court.
(ii) The Trust is thus given parental responsibility and control over the arrangements for the child.
(iii) The Trust has a duty to safeguard and promote the welfare of the individual child.
(iv) A care order operates until the child is 18 years of age.

<u>Supervision Order</u>

(i) The Trust does not acquire parental responsibility and the responsibility for safe guarding the welfare of the child also rests on the parents.
(ii) The Trust however is under a duty to advise, assist and befriend the child.
(iii) The Trust has a generally duty to safeguard and promote the welfare of all children in its area.
(iv) Information and access are required to be given to the supervisor.
(v) A supervision order does lack teeth to some extent and may only be 'enforced' by the Trust returning to court to ask for an extension or to make a fresh application for a care order.

(vi) In an emergency the Trust has no power under the supervision order to remove the child and would have to apply for an emergency protection order or interim care order.

[9] The Legal Principles Governing the Choice of Care or Supervision Orders

(i) I commence by repeating what I have said on other occasions namely that a court must recognise the draconian nature of legislation which empowers the court to invoke a care order. It is difficult to imagine any piece of legislation potentially more invasive than that which enables a court to break the bond between parent and child and to empower a Trust to remove a child from the bosom of the natural parent. It also represents potentially the clearest of interferences with the right to respect for family life and a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the European Convention"). Any interference with the right to respect for family life entails a violation of Article 8 unless it is in accordance with the law, has an aim or aims that is or are legitimate under Article 8(2) and is necessary in a democratic society for the aforesaid aims. This notion of necessity implies that the interference must correspond to a pressing social need and in particular that it is proportionate to the legitimate aim pursued. Parliament has thus conferred on the court far reaching powers to order the lives of minors for whom they are given statutory responsibility. It is of the utmost importance that such power should be exercised not only with the responsibility but with the sensitivity which is demanded where the exercise of power can create raw wounds in an emotionally charged situation. This is particularly so when considering the delicate and intimate engagement between parent and child. There is a long line of European Court of Human Rights jurisprudence emphasising that such intervention has to be proportionate to the legitimate aim. In *Re: O (Supervision Order)* [2001] 1 FLR 923 at p.929 Hale LJ (as she then was) said;

> "Proportionality therefore is the key. It will be the duty of everyone to ensure that, in those cases where a supervision order is proportionate as a response to the risk presented, a supervision order can be made to work, as indeed the framers of the Children Act 1989 always hoped that it would be made to work. The local authorities must deliver the services that are needed and must ensure that other agencies, including the health service, also

> play their part and the parents must co-operate fully."

(ii) Parliament has provided a wide range of powers under the 1995 Order to a Trust to prevent children in its area from suffering ill treatment or neglect. The court however must begin with a preference for the less interventionist approach unless there are cogent reasons to the contrary. That carries a particular resonance where the Trust is not seeking the more draconian measure notwithstanding the advice to the contrary from the Guardian ad Litem. In *Re: O (Care or Supervision Order)* [1996] 2 FLR 755 at p.759 Hale J (as she then was) said;

> "Parliament has also provided both a care order and a supervision order although it is quite clear from s31(1) (*of the Children Act 1989*), that once an application is made for an order under that section, the court is free to make a different order from the one which was asked for by the local authority. Nevertheless, if the court is to impose upon the authority an order other than that for which it asks, there should be very cogent reasons indeed to do so. It must be right to approach the question of the children's interests from the point of view which is exemplified by s1(5) of the act, that when considering whether to make any order under the Act the court is not to make an order unless it considers that doing so would be better for the child than making no order at all, and by s(3)(g) where it is required to consider the range of powers available under the act in the proceedings in question. It is accepted by all the parties before this court that the court should begin with a preference for the less interventionist rather than the more interventionist approach. This should be considered to be in the better interests of the children, again unless there are cogent reasons to the contrary."

It is worthy of note in this case that whilst Mrs W is vehemently opposed to a care order she is, albeit reluctantly, agreeable to a supervision order. Mr M, although concerned about the shortcomings of Mrs W, does not wish the children taken from her care but he is sufficiently concerned about the future to desire a care order with the proviso that the children remain in her care.

The Guardian ad Litem

[10] The Guardian ad Litem favoured a care order in this case although Mr O'Hara QC, who appeared on behalf of the Guardian, admitted that it was a close decision as to which was the appropriate order. He submitted however that the following arguments favoured a care order;

(i) The length of time that these proceedings have gone on, i.e. in excess of 5 years. It was the Guardian's view that if there was to be any meaningful change, given the history of lack of co-operation in the past on the part of the mother, the strength of a care order was needed. In particular the Guardian, who gave evidence in this matter, drew my attention to the fact that supervision orders have been granted periodically since 22 March 2003 to date and that they had not resolved the issues. Contact between the boys and their father have been formally suspended since March 2004 although in fact no contact had taken place since January/February 2004. This was indicative of the mother's failure to co-operate with Trust views .

(ii) Dr Robson, who gave evidence before me, indicated that the mother did require a high level of support and supervision. Whilst Dr Robson did not really have a preference as to whether or not a supervision or care order would be more effective, she did indicate that it might be more settling for the children to know that an order was being made until they had reached their majority without being asked each year, as might be the case, in the instance of a supervision order. Ms Holmes, the Guardian ad Litem, underlined this approach by indicating that the children required a closure to court proceedings which had now been ongoing since 1997.

(iii) The Guardian felt that a care order, in terms of the parental responsibility it would afford to the Trust, was necessary to overview medical issues for the benefit of the children which the mother might be reluctant to engage in. It was her experience that the presence of parental responsibility on the part of the Trust did lead to more additional services being provided. In essence, the Guardian urged that the poor prognosis for change with this woman and the need for her to be supported required the more draconian step of a care order.

(iv) Mr O'Hara drew my attention to *Re: T (A Minor) (Care or Supervision Order)* [1994] 1 FLR 103 which was authority for the proposition that it was not wrong in law to make a care order where the local authority intended to leave the child in the day to day care of the parents. That arrangement was not inconsistent with partnership between parents and the local authority because under the care order the parents did not lose their parental responsibility which was merely limited in

scope. He further cited *Re: K (Care Order or Residence Order)* [1995] 1 FLR 675 as authority for the proposition that whilst in ordinary circumstances the court should be slow to make a care order to a local authority which has applied for it but ultimately decides that it does not want to, nonetheless the court may make such an order if it concludes that the threshold criteria are satisfied and the welfare of the child demands it. Such a course would only be taken after considering the matter as set out in the welfare checklist.

Mrs W's Case

[11] Mr Long QC on behalf of the mother drew my attention to *Re: B (Care or Supervision Order)* [1996] 2 FLR 693. Whilst this case is authority for the proposition that it can be appropriate to make a full care order even if all parties agreed that the children should not be removed from home and the local authority was seeking a supervision order, nonetheless the court made that a care order was a much more serious order and should only be made if the stronger order was necessary for the protection of the child. Mr Long emphasised that in light of the Human Rights Act 1998 and the European Convention, there was a duty on the court to act in compliance with Articles 6 and 8 of the Convention. Hence he submitted the court should be extremely slow to bring about a situation where the Trust would be authorised to remove this child without resource to the court at a time when the Trust had no intention of so doing. Counsel argued that at this stage no one has envisaged circumstances where that power would need to be exercised and it would be contrary to the Convention to empower the Trust to take such a draconian step without recourse to the court again in light of its current disinclination to exercise such a power.

Conclusion

[12] I have decided that the appropriate order to make in this case is a supervision order. I have so determined having concluded that the threshold criteria have been satisfied, having considered the care plan and the welfare checklist set out in Article 3(3) of the 1995 Order, the provisions of Article 3(1), the paramount consideration of the childrens' welfare, the range of powers available to me under this order, and the provisions of Article 3(5) i.e. "the no-order principle". I have concluded this to be the case for the following reasons;

(i) Given the draconian nature of a care order, I must ensure that the lesser remedy of a supervision order is insufficient. The Trust do not currently foresee the need to invoke the power of removal and I am therefore reluctant to accord to the Trust the power to so do in the absence of further recourse to the court. The minimum invasion of the right to a family life should be the key to the court's approach. I do

not consider that there is any need to empower the Trust to remove the children at this stage. If emergencies arise then an emergency protection order can be quickly obtained as an interim measure and a further application for a care order made to the court. Care orders should only be sparingly made where no other alternative is open to the court.

(ii) Whilst I recognise that the court does have power to make a care order even if this is not being sought by the Trust, nonetheless that should only be in unusual circumstances. I am not satisfied that such unusual circumstances arise in this instance. I do not believe that the welfare of the children requires that I take such a step. I have reminded myself what a supervision order entails (see para 8 above) and I consider that ample protection for the welfare of these children can be provided by the services of a supervision order which in itself is an intrusion on family life. This mother of course must appreciate that if that proves an inadequate tool to protect these children, then the Trust can easily come before this court and make a further application for a care order.

(iii) There has been a history of lack of co-operation between this mother and the Trust. I believe that position will only be exacerbated if a care order is imposed against her wishes. It will simply strike another discordant note in what is already a volatile situation. Regardless of the order I make, there probably will be a measure of resistance to assistance by the Trust. That situation will be best ameliorated by a process which at least has the early acquiescence of the mother. The court is therefore minded to repose certain confidence in her to accommodate herself to a supervision order.

(iv) I have considered both the welfare of these children (which is my paramount consideration) and the parents' right to a family life under Article 8 of the European Convention. In all the circumstances I do not consider that a care order will be a proportionate response at this juncture to the legitimate aim protecting these children. I am satisfied that this mother is sufficiently capable of meeting the needs of the children with the assistance of a supervision order and that any harm which the children are at risk of suffering is materially diminished by an order with which she is in agreement. I direct that such a supervision order will have an added requirement that the children should continue to live at her current address and that any future move must be approved by the Trust.

[13] I note that Mr M and the maternal grandmother have now withdrawn their applications for direct contact and I therefore intend to invoke the no-order principle so far as future contact is concerned. Contact is clearly a

flexible notion and hopefully as time goes on, the current impasse will thaw and contact may be revisited at some future period.